



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 19, 1998

Ms. Kay Warren
Winkler County Auditor
P.O. Drawer O
Kermit, Texas 79745

Letter Opinion No. 98-023

Re: Whether the food service contract for a
county jail is subject to competitive bidding and
related questions (RQ-955)

The Honorable Tim Curry
Criminal District Attorney
Tarrant County
401 West Belknap Street
Fort Worth, Texas 76196-0201

Dear Ms. Warren and Mr. Curry:

You have each asked questions regarding the provision of food services for a county jail, and accordingly we will answer your questions together.

Ms. Warren asks whether the Winkler County sheriff may purchase food for all prisoners in the jail from his personal funds and be recompensed by receipt of per diem funds from the county. In our view, he may not.

A similar question was addressed by this office in Attorney General Opinion M-803. In that opinion, we wrote that "[s]heriffs paid on a salary basis are entitled to recover actual expenses incurred in the feeding of prisoners and must report such expenses accurately to receive reimbursement." Attorney General Opinion M-803 (1971) at 2. Attorney General Opinion M-803 relied on the scheme then in place subject to article 1046 of the Code of Criminal Procedure, which required the sheriff to present an itemized account of the expenses for maintaining prisoners, verified by his affidavit. *Id.*

Article 1046 was repealed in 1985 by chapter 269, section 5(2) of the Sixth-ninth Legislature as part of the nonsubstantive recodification of the Code of Criminal Procedure. The revisor's note takes the view that the procedures of article 1046 are "essentially meaningless" because article 3912k, V.T.C.S. "allows commissioners courts to determine methods of payment of office expenses"

Article 3912k itself has been repealed and recodified as part of the Local Government Code. The relevant provisions for our purposes are sections 152.011 and 152.013 of the Local Government Code. Section 152.011 gives the commissioners court the power to "set the amount of the compensation, office and travel expenses, and all other allowances" for county officers and -

employees "who are paid wholly from county funds." Sheriffs, as a constitutional matter, are salaried officers. Tex. Const. art. XVI, § 61. Accordingly, their office expenses are to be set by the commissioners court. Section 152.013 prescribes the method by which such expenses are to be set. The relevant provision here is section 152.013(a):

Each year the commissioners court shall set the salary, expenses, and other allowances of elected county or precinct officers. The commissioners court shall set the items at a regular meeting of the court during the regular budget hearing and adoption proceedings.

Since the care and feeding of county prisoners, which pursuant to article 104.002(a) of the Code of Criminal Procedure is a county liability, is a regular and continuing expense of the sheriff's office, sections 152.011 and 152.013 describe the way in which it must be budgeted. The sheriff may not be paid on a per diem basis in the way you describe.

Some strict accounting measure is necessary in the provision of food to county inmates in order to avoid a perverse incentive to lay out less than an office takes in. Accordingly, outlays for such expenses must be part of the ordinary county budgeting process pursuant to sections 152.011 and 152.013 of the Local Government Code.

The question then arises whether, if a contract is to be let for the provision of food services in the county jail, such a contract must be competitively bid under chapter 262 of the Local Government Code, or whether it may be exempt from such competitive bidding.

Mr. Curry has asked whether a food service contract for the Tarrant County Jail, for which service the county last year spent in excess of three million dollars, must be competitively bid. Section 262.023 of the Local Government Code requires that the purchase of "one or more items under a contract that will require an expenditure exceeding \$15,000" must be competitively bid. Accordingly, unless some exception to the statute requires otherwise, a food services contract with a value in excess of three million dollars must be competitively bid.

It is suggested that one or other of the two exemptions in Local Government Code section 262.024(a)(4), those for personal or professional services, may be applicable. This office has repeatedly analyzed the meaning of those exemptions, most recently in Letter Opinion 97-031. Based upon that analysis, it would not appear that either exemption is available in the instant case.

We note first that most service contracts, even in this age of automation, are performed by persons. Were that the legal meaning of "personal services," service contracts would generally be read out of the competitive bidding statute. It is not.

A personal services contract is a contract for the services of a particular individual. It is *not* a contract to provide persons who will perform a service. Letter Opinion No. 97-031 (1997) at 1-2. Unless the service to be provided is to be done by a unique, particular, named individual, rather than by anonymous and fungible workers, the contract is not for personal services.

Nor does the fact that a dietitian may be employed as part of the contract convert a contract for the provision, preparation, and service of food into a professional services contract.

We will assume, without deciding, that dietitians are "members of disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence." Attorney General Opinion JM-940 (1988) at 3. However, as we noted in Letter Opinion No. 97-031, "In the execution of large public contracts, it is conceivable that the services of many professionals might be useful But to assert that, because such professionals performed such ancillary services, the contract in question became a professional services contract, would allow [a professional services exemption] to swallow up all competitive bidding requirements." Letter Opinion No. 97-031 (1997) at 3.

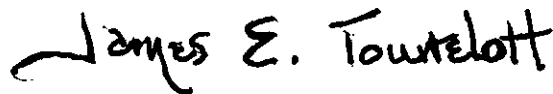
The commissioners court, of course, has the authority to decide whether a particular contract comes within the exemptions in section 262.024 of the Local Government Code. Moreover, this office does not interpret particular contracts in the opinion process. However, if as appears the only arguments for an exemption are those proffered, in our view they are unavailing.

S U M M A R Y

The sheriff of Winkler County may not purchase food for the prisoners in the county jail out of his personal funds and be recompensed by receipt of *per diem* funds from the county. Rather, as an expense of his office, the feeding of prisoners must be subject to the ordinary county budgeting process pursuant to sections 152.011 and 152.013 of the Local Government Code.

If a contract for food services with a value in excess of \$15,000 is let, it must be competitively bid. Such a contract is not a personal services contract, nor, even if professionals play some part in its execution, is it a *professional services contract*.

Yours very truly,

A handwritten signature in black ink that reads "James E. Tourtelott". The signature is written in a cursive, slightly slanted style.

James E. Tourtelott
Assistant Attorney General
Opinion Committee